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In the Supreme Court

OF THE

United States

October Term, 1950

No. 115

PETITION FOR A WRIT OF CERTIORARI

to the United States Court of Appeals

for the Ninth Circuit.

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1959

No.

JAMES D. CHARLES,
Petitioner,
vs.
UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit.

The petitioner, James D. Charles, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, affirming the judgment of the United States District Court for the District of Hawaii, adjudging petitioner guilty on each of four counts of an indictment which charged, in counts one and three, that petitioner acquired and obtained marihuana in violation of Section 4744(a), Title 26, U.S.C. and, in counts two and four,

that petitioner imported such marihuana into the United States in violation of Section 176(a), Title 21, U.S.C.

OPINIONS BELOW

No written opinion was filed by the District Court. The judgment of the District Court is printed in the record, pp. 24-26. The opinion of the Court of Appeals has not as yet been officially reported, but is printed in Appendix "A" hereto, infra, p. 1.

JURISDICTION

The judgment of the Court of Appeals was filed and entered on May 4, 1960. Appendix "B" hereto, infra, p. 6. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Rule 22(2) of the Rules of the Supreme Court of the United States.

QUESTION PRESENTED

1. Is the Fourth Amendment violated by subjecting a person, while under arrest on misdemeanor charges, to independent and unrelated searches of his person and dwelling for the sole purpose of obtaining evidence of the commission of a different offense?

STATUTES INVOLVED

Amendment IV, Constitution of the United States:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Rule 41, Federal Rules of Criminal Procedure, Title 18, U.S.C.A., provides in part:

* * *

(e) *Motion for Return of Property and to Suppress Evidence.* A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property and to suppress for use as evidence anything so obtained * * *."

(Full text of Rule 41 is set forth in Appendix "C", infra, p. 7.)

STATEMENT OF THE CASE

On September 3, 1958, shortly after 10:30 p.m., five members of the Police Department of Honolulu, a municipality of the then Territory of Hawaii, arrested petitioner at the door of his home upon two warrants sworn out by his wife on charges of threatening and assault and battery. (T 38-39, 41). Petitioner invited the officers inside the house while he read the warrants (T 39). At this time "the usual search, frisking of the

prisoner after being arrested" was made by one of the officers (T 39). One of the officers testified that as he walked into the house he detected a strong odor of marihuana and immediately started checking the ash trays (T 47). Another officer accompanied petitioner's sister-in-law outside the house to an automobile in order to get petitioner's eyeglasses. Upon their return this officer stated to another officer that petitioner was supposed to have marihuana on his person (T 39). The officers then took petitioner into the kitchen and made another search of his person (T 39-40). The testimony is that in this search the officers found a small package containing what appeared to be marihuana. Petitioner was then arrested for the unlawful possession of narcotics (T 40), and a subsequent search of his dwelling revealed a second package of what appeared to be marihuana in the garage (T 41, 82-83). The officers did not have a warrant.

Petitioner's motion to suppress evidence, filed pursuant to Rule 41(e) of the Federal Rules of Criminal Procedure (T 7-9), was denied (T 7-8). Petitioner's objection to the receipt of the seized articles in evidence, on the same ground, was overruled by the trial court (T 117). Defendant was found guilty on each of the four counts (T 140). Concurrent sentences of time and imprisonment were imposed (T 24-26). The issue on appeal to the Court of Appeals for the Ninth Circuit was reduced to a single question, viz.:

> Did the trial court improperly admit into evidence Exhibits 1 and 2 which had been seized by the officers as a result of their search of petitioner's person and premises?

Jurisdiction for the trial of the offenses charged in the indictment is conferred upon the District Court by Section 3231, Title 18, U.S.C.

The Court below affirmed the judgment of the District Court upon the theory that even though "the record clearly shows that the search of (petitioner's) pockets was designed to uncover narcotics although (petitioner) was not yet under arrest on narcotic charges" and the "purpose of the search was to obtain evidence of a crime different from that for which (petitioner) was arrested", such search was permissible under the Fourth Amendment. (See Appendix "A", infra, pp. 1, 4.)

REASONS FOR GRANTING CERTIORARI.

Clearly the question presented is of importance in the administration of the law of search and seizure. The decision of the Court below holds that a search does not violate the Fourth Amendment even though it specifically finds that the "purpose of the search was to obtain evidence of a crime different from that for which petitioner was arrested". The existence of so broad a power to search without a search warrant has never been suggested by the decisions of this Court.

Judicial sanction of such equivocal methods strikes at the substance of the constitutional right. *Byars v. U. S.*, 273 U.S. 28, 33-34.

Search without a search warrant is sustainable as an incident to lawful arrest only if it is specifically di-

rectal to the instrumentalities or fruits of the crime charged, weapons, and other things to effect an escape from custody. *Abel v. U. S.*, 362 U.S. 217; *Harris v. U. S.*, 331 U.S. 145, 151; *U. S. v. Rabinowitz*, 339 U.S. 56, 61.

An arrest, however lawful, does not empower officers to undertake search of person or premises for the specific purpose of obtaining evidence of commission of a different crime. In *Abel*, supra, 362 U.S., at page 238, this Court stated that the officer arresting on an immigration warrant "was not only not looking for items connected with espionage but could not properly have been searching for the purpose of finding such items". General exploratory searches cannot be undertaken by officers with or without a warrant.

Rabinowitz, supra, 339 U.S. at pages 56, 62.

Probable cause for belief that certain articles subject to seizure are in a dwelling cannot justify search without a warrant. *Jones v. U. S.*, 357 U.S. 493, 498; *Agnello v. U. S.*, 269 U.S. 20, 32. Compare Rule 41(c) of the Federal Rules of Criminal Procedure limiting the issuance of nighttime search warrants, Appendix "C", infra, pp. 7-8. Unlawful search is not validated by what is found. *Miller v. U. S.*, 357 U.S. 301, 312; *U. S. v. Di Re*, 332 U.S. 581, 595.

The decision of the Court below implies that the power to search after lawful arrest is broader than that which exists where a search warrant has been properly obtained under all applicable constitutional limitations and judicial safeguards. Such a doctrine

encroaches upon the basic protection of the Fourth Amendment and Rule 41 of the Federal Rules of Criminal Procedure.

The prohibition of the Fourth Amendment forbids every search that is unreasonable. *U. S. v. Lefkowitz*, 285 U.S. 452, 464; *Gouled v. U. S.*, 255 U.S. 298, 305. There is no formula for the determination of reasonableness. "Each case is to be decided on its own facts and circumstances." *Go-Bart Importing Company v. U. S.*, 282 U.S. 344, 357.

A lawful arrest cannot automatically render constitutional a subsequent independent search for the specific purpose of discovering objects not reasonably related to the cause of the arrest.[2] An arrest must not be used as a pretext to search for evidence. *Lefkowitz*, supra, 285 U.S. at pages 452, 467.

If an officer serving a warrant of arrest is empowered to search contemporaneously for evidence of unconnected crime, then the search warrant procedures of the Fourth Amendment and Rule 41 are circumvented.

A grave question of constitutional right is involved in this case. The possible consequences of the decision of the Court below are so far reaching that this Court should give consideration to the issue presented.

[1] Pertinent testimony as to the facts and circumstances here are contained in Appendix "D", infra, pp. 11-12.

[2] See *Rabinowitz v. U. S.*, C.A.D.C. 1950, 271 F.2d 529, 531, where the accused was arrested for vagrancy and the Court of Appeals said that the subsequent search of his person for narcotics was unreasonable and not incidental to his arrest.

CONCLUSION

For the foregoing reasons, this petition for writ of certiorari should be granted.

Dated, San Francisco, California,
May 25, 1960.

JOSEPH S. HERTOGS,
Attorney for Petitioner.

WALTER H. DUANE,
ARTHUR J. PHELAN,
Of Counsel.

(Appendices A, B, C and D Follow)

Appendix "A"

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JAMES D. CHARLES,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee

No. 16,477
May 4, 1960

Appeal from the United States District Court
for the District of Hawaii

Before: CHAMBERS, BONE and MERRILL, Circuit Judges.

BONE, Circuit Judge.

Appellant stands convicted on four counts of an indictment, two counts charging unlawful acquisition and importation of a package of marijuana found upon his person and two counts containing similar charges in regard to a second package discovered in his garage. Appellant contends that both packets of narcotics were wrongfully admitted into evidence, that they were obtained by searches and seizures which violated the Fourth Amendment.

Five members of the Honolulu Police Department arrested appellant at the door to his home upon two warrants sworn out by his wife charging threatening and assault and battery. Appellant invited the officers inside the house while he read the warrants. He was "frisked" at this time and found to be unarmed. A patrol wagon was summoned to pick up the prisoner. One of the officers testified that as he walked into the house he detected the odor of burning marijuana in the air. Another officer accompanied appellant's sister-in-law outside the house to an automobile in order to get appellant's eyeglasses. Upon their return this officer stated to another officer that appellant was supposed to have marijuana on his person. Appellant was told to empty his pockets on the kitchen

cash. Among the articles thus placed in view by the first packet of marijuana. Appellant was then arrested for the unlawful possession of narcotics, and a subsequent search of the premises revealed the second packet in the garage. The officers did not have a search warrant.

Appellant makes a three pronged argument. He contends that the sole dealing were the admissibility of evidence obtained by police officers of a municipality in the then Territory of Hawaii in federal courts must apply the rule of Weeks v. United States, 232 U.S. 383 (1914), rather than the so-called "silver platter" doctrine announced in Lustig v. United States, 338 U.S. 74 (1949). He next argues that in causing appellant to empty his pockets on the kitchen table the officers engaged in an unlawful search which cannot be considered incident to the admittedly valid arrest upon the two warrants for threatening and assault and battery. Finally, he contends that the probable cause to arrest appellant at any time prior to the discovery of his packets of the unlawful possession of narcotics, and that no police could neither search his person nor the garage as an incident thereof.

We think both packages of marijuana were lawfully obtained. Consequently, we find it unnecessary to determine which exclusionary rule would apply when territorial law enforcement officers consummate a search in contravention of the Fourth Amendment. The seizure of the packet of marijuana upon appellant's person was properly adjudged the subsequent arrest for unlawfully possessing narcotics was founded upon probable cause enabling the police to search the premises for the purpose of finding further evidence of the narcotics violation and to seize in the course of that search the second package of marijuana. Harris v. United States, 331 U.S. 145 (1947); United States v. Rabinowitz, 339 U.S. 56 (1950); Vida v. United States, Supreme Court, 28 S.Ct. 60; Williams v. United States, 273 F.2d 781, 795 (9th Cir. 1959), cert. denied, 4 L.Ed.2d

It is beyond dispute that an officer making a valid arrest may search the person of the accused as an incident of his arrest.

The "silver platter" doctrine is currently under fire. Compare Elkins v. United States, 266 F.2d 723 (D.C. Cir. 1958) with United States v. Lanza, 271 F.2d 787 (7th Cir. 1959). A pertinent Supreme Court decision is forthcoming; see 359 U.S. 965, granting certiorari in Elkins v. United States, 266 F.2d 175, (9th Cir. 1958).

Weeks v. United States, supra, at 392; Carroll v. United States, 267 U.S. 132, 158 (1925); Agnello v. United States, 269 U.S. 20, 30 (1925). Courts have historically permitted such a search for a number of reasons: Closson v. Morrison, 47 N.H. 482, (1867) (to protect arresting officer, to deprive prisoner of means of escape); Reitsnyder v. Lee, 44 Iowa 101, 105 (1876) (to avoid destruction of evidence). See United States v. Rabinowitz, supra at 72 (dissenting opinion); Dillon v. O'Brien, 16 Cox Crim. Cas. 245 Exch. Ireland 1887). Here the record clearly shows that the search of appellant's pockets was designed to uncover narcotics although appellant was not yet under arrest on narcotics charges. In other words, the purpose of the search was to obtain evidence of a crime different from that for which appellant was arrested. A search of appellant's premises provoked by such a purpose would violate the Fourth Amendment. United States v. Lefkowitz, 285 U.S. 452 (1932); Go-Bart Importing Co. v. United States, 282 U.S. 344 (1931). One problem here is whether or not the second search of appellant's person was similarly invalidated because the police were seeking to obtain evidence of a crime uncharged. Assuredly, a second search of appellant's person for concealed weapons, improving upon the earlier, desultory "frisking" would not aggravate constitutional strictures.

Searches of both the person arrested and the place where the arrest is made derive their legality in the absence of a search warrant from the existence of a lawful arrest. Without probable cause to arrest, subsequent searches either of person or property violate the Fourth Amendment. That a search is incident to a valid arrest saves it from proscription. The apparent reasoning behind this principle is that once a valid arrest is made, the privacy of the accused has for the most part been lawfully destroyed. Further intrusion connected with and justified by the fact of arrest should not be precluded. Accordingly, a search of the place of arrest for evidence of the crime for which the accused has been arrested is permissible. However, if police action is not justified by or connected with the arrest, such as when a search of the place of arrest is designed to uncover evidence of a crime other than the one upon which the arrest was made, the further intrusion upon privacy cannot be tolerated. When a search has nothing to do with the arrest, it cannot be deemed incident to the accused's

apprehension. Divorced from the search, the fact of arrest does not justify impairment of the right to privacy.

On the other hand, it seems to us that a search of the person of the accused, even for the purpose of uncovering evidence of a crime other than that which is charged, is generally incident to a valid arrest. Power over the body of the accused is the essence of his arrest; the two cannot be separated. To say that the police may curtail the liberty of the accused but refrain from impinging upon the sanctity of his pockets except for enumerated reasons is to ignore the custodial duties which devolve upon arresting authorities. Custody must of necessity be asserted initially over whatever the arrested party has in his possession at the time of apprehension. Once the body of the accused is validly subjected to the physical dominion of the law, inspections of his person, regardless of purpose, cannot be deemed unlawful, see People v. Chiagles, 237 N.Y. 193, 142 N.E. 583 (1923), unless they violate the dictates of reason either because of their number or their manner of perpetration.[2] Hence, we think that the second search of appellant's person was permissible under the Fourth Amendment, and the packet of marijuana thereby obtained was properly admitted into evidence. Consequently, as previously noted, the search for the second package was also lawful, and it too was properly seized and correctly admitted in evidence.

In deciding as we do, we need not determine whether or not the police officers, having lawfully entered appellant's house at his invitation, had probable cause to arrest him for a narcotics viola-

[2] Modern police practice calls for a thorough search at the station-house of any person who is taken into custody as well as the "frisking" which takes place at the moment of arrest. See Honolulu Police Department, General Orders at p. 50 (1957); San Francisco Police Department, Rules and Procedures, §§ 12.47-12.51; United States Marshals Manual at p. 7040[1]; Calahan, The Policeman's Guide at p. 113 (1952); Sheehan, Modern Police Work at p. 337 (1939). Such searches are not unreasonable; they are an integral part of efficient police procedure. See Bascomb v. United States, 227 F.2d 454 (10th Cir. 1955). We cannot say that an accused may be thoroughly searched for a second time at the station-house, but not pending the arrival of the patrol wagon. No right to privacy would be enhanced by such a position. We would only be affording the accused the opportunity to dispose of incriminating evidence before he reaches the place of initial detention.

ing on the sole strength of the identifiable odor of burning marijuana in the air, a nice problem further complicated by the fact that both appellant and his sister-in-law were present in the room where the odor was detected. See Johnson v. United States, 333 U.S. 10 (1948). Nor need we determine, assuming probable cause to arrest on narcotics charges, whether or not the search of appellant's pockets was justified as an incident of that arrest. The search followed both the acquisition of the assumed probable cause for the narcotics arrest and the arrest upon the warrants for assault and battery and threatening, nor it preceded the formal announcement of the narcotics arrest of which it might be deemed an incident. In this regard, *compare* People v. Simon, 45 Cal. 2d 645, 290 P.2d 531 (1955), *with* Pepani v. United States, 84 F.2d 160 (9th Cir., 1936).

The judgment of the lower court is affirmed.

Endorsed: Opinion Filed May 4, 1960.

Frank H. Schmid, Clerk.

In the absence of an applicable federal statute the validity of an arrest without a warrant is a matter of local law. United States v. Di Re, 332 U.S. 581, 589 (1948); Johnson v. United States, *supra* at 15; Miller v. United States, 357 U.S. 301, 305 (1958). The Hawaii statute applicable in the instant case is 2 Rev. Laws of Hawaii 1955, 255-3. No Hawaii decision deals with probable cause predicated upon the odor of smell.

Appendix "B"

United States Court of Appeals
for the Ninth Circuit

No. 16,477

James D. Charles,
Appellant.

vs.

United States of America,
Appellee.

JUDGMENT

Appeal from the United States District Court for the District of Hawaii.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the District of Hawaii, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the Judgment of the said District Court in this cause be, and hereby is affirmed.

(Endorsed) Judgment
Filed and entered: May 4, 1960
Frank H. Schmid, Clerk.

Appendix "C"

FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 41. Search and Seizure.

(a) Authority to Issue Warrant. A search warrant authorized by this rule may be issued by a judge of the United States or of a state, commonwealth or territorial court of record or by a United States commissioner within the district wherein the property sought is located.

(b) Grounds for Issuance. A warrant may be issued under this rule to search for and seize any property

(1) Stolen or embezzled in violation of the laws of the United States; or

(2) Designed or intended for use or which is or has been used as the means of committing a criminal offense; or

(3) Possessed, controlled, or designed or intended for use or which is or has been used in violation of Title 18, U.S.C., Sec. 957.

(c) Issuance and Contents. A warrant shall issue only on affidavit sworn to before the judge or commissioner and establishing the grounds for issuing the warrant. If the judge or commissioner is satisfied that grounds for the application exist or that there is probable cause to believe that they exist, he shall issue a warrant identifying the property and naming or describing the person or place to be searched. The war-

rant shall be directed to a civil officer of the United States authorized to enforce or assist in enforcing any law thereof or to a person so authorized by the President of the United States. It shall state the grounds or probable cause for its issuance and the names of the persons whose affidavits have been taken in support thereof. It shall command the officer to search forthwith the person or place named for the property specified. The warrant shall direct that it be served in the daytime, but if the affidavits are positive that the property is on the person or in the place to be searched, the warrant may direct that it be served at any time. It shall designate the district judge or the commissioner to whom it shall be returned.

"(d) Execution and Return with Inventory. The warrant may be executed and returned only within 10 days after its date. The officer taking property under the warrant shall give to the person from whom or from whose premises the property was taken a copy of the warrant and a receipt for the property taken or shall leave the copy and receipt at the place from which the property was taken. The return shall be made promptly and shall be accompanied by a written inventory of any property taken. The inventory shall be made in the presence of the applicant for the warrant and the person from whose possession or premises the property was taken, if they are present, or in the presence of at least one credible person other than the applicant for the warrant or the person from whose possession or premises the property was taken, and shall be verified by the officer. The judge or commis-

sioner shall upon request deliver a copy of the inventory to the person from whom or from whose premises the property was taken and to the applicant for the warrant.

(c) Motion for Return of Property and to Suppress Evidence. A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property and to suppress for use as evidence anything so obtained on the ground that (1) the property was illegally seized without warrant, or (2) the warrant is insufficient on its face, or (3) the property seized is not that described in the warrant, or (4) there was not probable cause for believing the existence of the grounds on which the warrant was issued, or (5) the warrant was illegally executed. The judge shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted the property shall be restored unless otherwise subject to lawful detention and it shall not be admissible in evidence at any hearing or trial. The motion to suppress evidence may also be made in the district where the trial is to be had. The motion shall be made before trial or hearing unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion, but the court in its discretion may entertain the motion at the trial or hearing.

(d) Return of Papers to Clerk. The judge or commissioner who has issued a search warrant shall attach to the warrant a copy of the return, inventory and all other papers in connection therewith and shall

file them with the clerk of the district court for the district in which the property was seized.

(g) Scope and Definition. This rule does not modify any act, inconsistent with it, regulating search, seizure and the issuance and execution of search warrants in circumstances for which special provision is made. The term "property" is used in this rule to include documents, books, papers and any other tangible objects. As amended Dec. 27, 1948, eff. Oct. 20, 1949.

Appendix "D"

TESTIMONY OF OFFICER WRAY STRAUSS.

"Q. To what duties are you normally assigned at the Police Station?

A. Narcotics Squad, the Vice Division.

Q. And to what duties is Sergeant Akana normally assigned?

A. Morals Squad.

Q. Also a part of the Vice Division?

A. Yes, sir.

Q. What was the nature of the two warrants that Sergeant Akana had for service on the defendant that evening?

A. Both warrants—one threatening, and one assault and battery, issued by Mrs. Charles, alias Susan Takahashi."

(T. 11)

"Q. And invited you in and said that he wanted to read the warrants?

A. The service was made at the door there, and he said he wanted to read the warrants, asked come on in.

Q. And you say that after you came in he was, if I quote your words accurately, frisked in the normal manner?

A. The normal search for weapons, yes.

Q. And that was the normal search that was made for the service of an A&B and threatening warrant?

A. Whenever a person is arrested.

Q. No search was made for the suspected contraband until after Officer Sandiago came in and said that

Charles was supposed to have some marihuana, is that correct?

A. Just a package of cigarettes that he had sticking out of his pocket.

Q. I said, no search was made beyond this frisking that took place immediately after you entered the room until after Officer Sandiago came in and stated that Charles was supposed to have some marihuana?

A. That's right."

(T 45, 46)

"Q. From the time that you entered the house and until the time he first produced the package of cigarettes from his pocket, you were then in the kitchen, and about how long elapsed?

A. About 15, 20 minutes, I guess.

Q. And during that 15 or 20 minutes, what was done?

A. Charles had asked us in. We all walked in. He walked ahead, naturally, the first one, and Sergeant Akana and myself. As we walked in, as soon as we walked into this living room, I smelled a strong odor of marihuana. I called Sergeant Akana's attention to it, and we continued on into the room. I myself started checking as we walked in the living room, checking the ash trays. We met the girl. More or less everyone stood right within the living room. The warrants were explained to Mr. Charles. I believe he asked Sergeant Akana a few questions in regard to the warrants. He couldn't understand it. He was back with his wife again. He couldn't understand it."

(T 47)

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In the Supreme Court of the United States

OCTOBER TERM, 1959

JAMES D. CHARLES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

J. LEE RANKIN,
Solicitor General,
MALCOLM RICHARD WILKEY,
Assistant Attorney General,
EUGENE L. GRIMM,
Attorney,
Department of Justice, Washington 25, D.C.

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In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 976

JAMES D. CHARLES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (R. 161–165) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on May 4, 1960 (R. 166). The petition for a writ of certiorari was filed on May 31, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, when a person has been arrested pursuant to a valid warrant unrelated to narcotics, it is proper to search his person and the premises and to seize contraband marihuana so found.

STATEMENT

A four-count indictment charged the petitioner with two transactions involving marihuana. Two counts were based on each transaction—one alleging unlawful importation of marihuana (21 U.S.C. 176(a)) and the other alleging the acquisition of marihuana without having paid the transfer tax thereon (26 U.S.C. 4744(a)) (R. 1-5). The petitioner was found guilty by a jury as charged (R. 23, 140). He was sentenced to ten years' imprisonment on each count (the terms to be concurrent) and to fines totalling $1,000 (R. 24-26, 152-153). On appeal, the court of appeals affirmed.

The issue in this case relates solely to the seizure by local police officers of marihuana which the petitioner had on his person and in his garage at the time of his arrest for other offenses. Prior to trial the petitioner moved to suppress use of the marihuana in evidence (R. 7-9). The facts relating to this issue are as follows:

At about 10:00 p.m., officers of the Honolulu Police Department went to the petitioner's home to arrest him on two warrants charging assault and battery and uttering threats (R. 38, 44). The petitioner responded to a knock on the door, was informed of the officers' identity and purpose, and was arrested on the warrants. He invited the officers to step inside, saying that he wished to read the documents. As they entered the living room, the officers noticed the strong and distinctive odor of burning marihuana (R. 39, 46-47, 50, 93, 97). They were introduced to the petitioner's sister-in-law, Miss Takahashi, who was present in the room. Then an officer "frisked" the

petitioner for weapons and another summoned the patrol wagon. Meanwhile, the police checked the ashtrays in the room (R. 39, 46–48). One officer, who had accompanied Miss Takahashi while she obtained the petitioner's glasses from his automobile outside, reentered the house and stated that the petitioner "was supposed to have some marihuana on him." (R. 39, 48, 95–96). The police asked the petitioner to "take everything out of his pockets and lay it on the table"; when the petitioner did so he attempted to conceal one item. That item turned out to be a small packet containing marihuana (R. 39–40, 51–52, 80–81, 90, 101–102). The petitioner was then placed under arrest for possession of marihuana (R. 40). A search of the premises followed, during the course of which the officers found a second package of marihuana in the petitioner's garage (R. 41; 65–66, 82–83).

The district court upheld the second search of the petitioner's person as a lawful incident of his arrest on the warrants and denied his motion to suppress (R. 72–73). The court of appeals affirmed on the same basis. It pointed out, as to the emptying of the petitioner's pockets, that the officers had acquired dominion over the petitioner's person as a result of his arrest pursuant to the warrants and that the right to search his person was an incident of that arrest. The fact that a cursory initial search of the petitioner for weapons had already been made did not

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[1] In this regard, it is not clear from the opinion of the appellate division of the Hawaiian District Court in *Territory v. Lee*, 52 Haw. 1, 468 P. 2d 51, that searches made by local police on a federal warrant are searches made by local police on a federal territory.

vitiate the second more thorough search, especially since, by local police regulation, the petitioner was liable to a thorough search when he reached police headquarters in any event. Nor did it matter that the second search was made with the expectation of finding contraband marihuana (R. 163–164). The court of appeals summed up its reasoning as follows (R. 164):

> Power over the body of the accused is the essence of his arrest; the two cannot be separated. To say that the police may curtail the liberty of the accused but refrain from impinging upon the sanctity of his pockets except for enumerated reasons is to ignore the custodial duties which devolve upon arresting authorities. Custody must of necessity be asserted initially over whatever the arrested party has in his possession at the time of apprehension. Once the body of the accused is validly subjected to the physical dominion of the law, inspections of his person, regardless of purpose, cannot be deemed unlawful. * * * unless they violate the dictates of reason either because of their number or their manner of perpetration. Hence, we think that the second search of appellant's person was permissible under the Fourth Amendment. * * *.

The court also held that the search of the petitioner's garage was a valid incident of his arrest, since it followed notification to him that he was being held on a narcotics charge (R. 163–164).

ARGUMENT

The gist of the petitioner's argument in this Court is that a person arrested under a valid warrant may

only be searched for the purpose of uncovering items which could be used to effect an escape and such other objects as are "reasonably related to the cause of the arrest" (Pet. 7), a claim which he believes is supported by cases where it was alleged or shown that a general exploratory search had been made (Pet. 5–7). In those cases, however, one of the questions was whether the arrest (or attempted arrest) was made in good faith, or merely as a pretext to conduct an otherwise unlawful search of premises.[1] There is no such problem in this case. The petitioner, at the time when he was told to empty his pockets, was validly under arrest pursuant to two warrants served upon him by the officers. They intended to take him to police headquarters as soon as the patrol wagon arrived. Incident to that valid arrest, the officers acquired the right to make a search of the petitioner's person—a search which inevitably would have been made later at the police station. When the officers undertook to exercise that right, and told the petitioner to place the contents of his pockets on the table, petitioner attempted to conceal one item. That item turned out to be marihuana, a contraband substance subject to seizure. "An arresting officer is free to take hold of articles which he sees the accused deliberately trying to hide", *Abel* v. *United States*, 362 U.S. 217, 238, and this Court has already held that it is not a significant consideration that the contra-

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[1] See, for example, *Abel* v. *United States*, 362 U.S. 217, 225–226; *Jones* v. *United States*, 357 U.S. 493, 499–500; *United States* v. *Lefkowitz*, 285 U.S. 452, 465–467; *Harris* v. *United States*, 331 U.S. 145, 153; *Go-Bart Importing Company* v. *United States*, 282 U.S. 344, 357–358.

band which was seized was not related to the crime for which the petitioner was arrested." *Harris v. United States*, 331 U.S. 145, 154. Nor is it material that this search was, in a sense, the second search of the petitioner's person. See *Abel v. United States*, *supra*, 362 U.S. at 239.

The petitioner complains that, after his arrest, the officers acquired probable cause to believe that the petitioner was in possession of marihuana, and so were specifically looking for contraband when the second search was made. In answer to this argument the court of appeals stated, "Custody must of necessity be asserted initially over whatever the arrested party has in his possession at the time of apprehension. Once the body of the accused is validly subjected to the physical dominion of the law, inspections of his person, regardless of purpose, cannot be deemed unlawful * * *." *(supra*, p. 4). Such an inspection does not breach any privacy of the petitioner not already abrogated incident to the arrest. The fact that the officers were searching for, and found, contraband rather than something related to the cause for the petitioner's arrest goes to the question of whether or not the initial arrest was valid, or merely a deception adopted to authorize an otherwise unlawful search. See *White v. United States*, 271 F. 2d [illegible], 831 (C.A. D.C.). Here, it is not questioned but that the arrest was made in good faith and pursuant to valid warrants.

After marihuana was found on the petitioner's person, he was told that thereafter he was being held on a narcotics charge. The search of his garage

which resulted in the discovery of a second package of marihuana, was a valid incident of that police action. *United States* v. *Rabinowitz*, 339 U.S. 56, 61; *Harris* v. *United States*, *supra*, 331 U.S. 145.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be denied.

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JUNE 1960.

FILE COPY

In the Supreme Court

OF THE

United States

No. 118

PETITION FOR REHEARING OF ORDER DENYING
PETITION FOR WRIT OF CERTIORARI.

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1960

No. 118

JAMES D. CHARLES,
Petitioner,
vs.
UNITED STATES OF AMERICA,
Respondent.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI.

Petitioner prays that this Court grant rehearing of its order of October 10, 1960, denying the petition for writ of certiorari, ... U.S. ..., and that a writ of certiorari issue to review the judgment of the Court of Appeals for the Ninth Circuit in the above-entitled cause as prayed for in the petition filed May 31, 1960, herein.